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IN THE SUPREME COURT OF THE UNITED STATES

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE NEW YORK CITY COMPTROLLER, LOS ANGELES, CALIFORNIA, PHILADELPHIA, PENNSYLVANIA, SAN FRANCISCO, CALIFORNIA, BOULDER, COLORADO, PORTLAND, OREGON, QUINCY, MASSACHUSETTS, OAKLAND, CALIFORNIA, BROOKLINE, MASSACHUSETTS, CARRBORO, NORTH CAROLINA, BERKELEY, CALIFORNIA, NEWTON, MASSACHUSETTS, NORTH OLMSTEAD, OHIO, SANTA CRUZ, CALIFORNIA, AMHERST, MASSACHUSETTS AND THE COUNTY OF ALAMEDA, CALIFORNIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Sara C. Kay
Jane R. Levine*
OFFICE OF ALAN G. HEVESI
COMPTROLLER OF THE CITY OF NEW YORK
One Centre Street
New York, New York 10007
(212) 669-3749
**Counsel of Record*

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INTEREST OF AMICI CURIAE[1]

In *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) the First Circuit Court of Appeals invalidated a Massachusetts selective purchasing law designed to discourage state agencies from using public money to purchase goods and services from suppliers that do business with Burma (now known as Myanmar). This "Burma Law" requires state agencies to deem that bids from such putative contractors are ten percent higher than the price actually offered. *See* Petitioner's Brief, pp. 5-10. By providing a ten percent competitive advantage to contractors that do not do business with Burma, the citizens of Massachusetts, through their elected officials, seek to avoid using their tax levy revenues to support the profoundly antidemocratic government of Burma in its well-documented campaign of human rights abuses. The First Circuit ruled, *inter alia*, that the Commonwealth of Massachusetts lacked a "legitimate local purpose [for this law] that cannot be adequately served by reasonable nondiscriminatory alternatives" and held that the law unconstitutionally encroaches on federal authority over foreign affairs and interferes with foreign commerce.

The *amici curiae* are cities, towns, counties and elected officials[2] of cities having selective purchasing laws limiting

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[1] Pursuant to Rule 37.6 of this Court, the *amici* represent that counsel for the *amici* authored this brief in its entirety and that no person or entity other than the *amici* and their representatives made any monetary contribution to the preparation or submission of this brief.

[2] The Comptroller of the City of New York is an independently elected official who, under the City Charter, has oversight authority over City contracting procedures, including compliance with selective purchasing laws, and who is a trustee of, and the investment advisor to, the City's pension funds.

their purchases of goods and services from suppliers that do business with Burma and/or other countries. Each *amicus'* selective purchasing law is one of a series of spending guidelines intended to ensure that its procurement and investment programs reflect its citizens' priorities -- which include an unwillingness to do business directly or indirectly with entities that violate basic human rights norms. The local government *amici* have a significant stake in the continued viability of selective purchasing laws and are concerned about maintaining the proper federal-state balance in this respect.

The First Circuit's Decision Threatens Government Procurement and Investment Laws in States and Localities Nationally.

Community-based selective purchasing laws have a distinguished lineage. The best-known examples undoubtedly are the state and local anti-Apartheid laws passed in the late 1970's and 1980's.[3] *See, e.g., Board of Trustees v. Mayor and City Council of Baltimore*, 317 Md. 72, 562 A.2d 720 (1989), *cert. denied*, 493 U.S. 1093 (1990). These procurement and divestment initiatives, supported by a strong national grass-roots movement, led to the passage of the federal Comprehensive Anti-Apartheid Act of 1986 over then-President Reagan's veto, and were a major factor in encouraging the South African government to institute broad human rights reforms. *See* Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, 86 Foreign Policy 158, 160 (1992).

[3] According to one commentator, 23 states, 14 counties, 80 cities and the Virgin Islands enacted divestment or procurement laws directed to South Africa's apartheid policies. *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 Am. J. Int'l Law 821, 822 (1989).

Since then, state and local governments across the country have responded to citizen demands by enacting a variety of laws establishing other non-economic standards for their procurement and/or investment programs. For example, like Massachusetts, a number of communities have enacted selective purchasing laws that restrict public contracts with vendors doing business with foreign sovereigns having poor human rights records. *See, e.g.*, LOS ANGELES, CA., ADMIN. CODE, §§ 10.38 et seq; SAN FRANCISCO, CA., ADMIN. CODE, Ch.12J; PHILADELPHIA, PA., CODE § 17-104(b); ALAMEDA COUNTY, CA., ADMIN. CODE, Ch. 4.32, Ch. 4.36; OAKLAND, CA., MUNI. CODE, Ch. 2.04, Arts. II, III; NEWTON, MASS., ORDINANCES V-146; BOULDER, CO., CODE Sec. 2-8-11, B.R.C. 1981. Many states and localities limit public contracts with vendors that fail to comport with other ethical standards of concern to their citizens. *See, e.g.*, BROOKLINE, MASS., RESOLUTION (July 12, 1976) (government contractors may not participate in Arab League boycott of Israel); NEW YORK, N.Y., ADMIN. CODE § 6-115.1 (establishes preferences for contractors that agree to provide equal employment opportunity to workers of all religions if they operate in Northern Ireland).

Many communities also have guidelines focussing on environmental and labor standards. For instance, three states and numerous municipalities have enacted laws limiting the purchase of wood from tropical rainforests, buying only tropical timber that is certified as having been harvested using ecologically-sound management practices. *See, e.g.*, ARIZ. REV. STAT. ANN. § 34-201 (West 1998); N.Y. STATE FIN. L. § 165 (McKinney 1998); TENN. CODE ANN. § 4-3-112 (1998); BALTIMORE, MD., ORDINANCES No. 635 (1991); SAN FRANCISCO, CA., ORDINANCES No. 391-90; SANTA MONICA, CA., MUNI. CODE. ch. 2.28. Other communities have established purchasing preferences for goods having recycled content. *See, e.g.*, NEW YORK, N.Y., ADMIN. CODE § 6-322. In addition, several municipalities and counties have adopted

government procurement standards barring products made in sweatshops. *See, e.g.*, NORTH OLMSTEAD, OHIO, RESOLUTION No. 97-9 (1998).

A number of municipalities and states also have chosen to use their purchasing power to support local businesses by enacting "Buy-American" laws for public procurements. *See, e.g., Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 112 (1991) (upholding Pennsylvania Steel Products Procurement Act).

In addition to selective purchasing laws, many state and local governments have adopted ethical rules concerning the investment of public funds. *See, e.g.*, SANTA CRUZ, CA., CITY COUNCIL POLICIES No. 29.13 (companies doing business with Burma); TAKOMA PARK, MD. ORDINANCES No. 1985-4, § 1 (companies that produce nuclear weapons); 1999 VERMONT LAWS, ch. 13 (state pension funds required to support shareholder resolutions concerning Burma). Most recently, a number of municipalities and states successfully used the threat of an investment and purchasing boycott against certain banks and insurers to encourage these companies to settle outstanding Holocaust-era claims. *See* Joan Warner with John Parry, *Swiss Banks: the Noose Tightens*, Business Week, July 27, 1998 at 66.

The continued viability of these laws is important because they represent community-based democracy at its best. They raise public consciousness on important issues of public policy and stimulate debate concerning the best use of community resources. If the First Circuit's decision is upheld, legitimate spending programs of state and local governments nationwide will be severely disrupted. As importantly, states and localities will lose an important tool for fostering civic engagement and clarifying common values on important and community-defining questions. The *amici's*

interest in this case is best reflected in Justice Breyer's observation that "[f]ederalism matters to ordinary citizens seeking to maintain a degree of control, a sense of community, in an increasingly interrelated and complex world." *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219, 2239 (1999) (Breyer, J., dissenting).

SOURCE OF AUTHORITY TO FILE

The *amici* have authorized this brief to be filed in their names by virtue of individual letters on file with counsel. Pursuant to Rule 37.2(a) of the Rules of this Court, *amici* obtained letters from each of the parties granting permission to file this brief, which accompany their submission.

SUMMARY OF ARGUMENT

The question presented by this case is whether the federal courts can declare that state spending guidelines unconstitutionally interfere with federal authority over foreign commerce and foreign affairs, where Congress has implicitly permitted the state action. The answer clearly must be in the negative.

As residual sovereigns, states have strong Tenth Amendment interests in controlling their own spending. They have a direct responsibility to their citizens to expend public resources in a manner comporting with community ethics and priorities. Where the Federal government exercises authority over such core state functions, states lose their autonomy; accountability and authority are blurred and principles of participatory democracy are threatened.

In view of the important Tenth Amendment concerns at issue, the court below never should have reached the question of whether the state law violated the foreign commerce

clause or the foreign affairs power. That decision belongs to Congress, both as a matter of constitutional structure and a matter of institutional expertise. Indeed, mindful of the complex political considerations underlying state proprietary action, this Court has disclaimed competence to apply commerce clause analysis to state spending. Moreover, in *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), this Court recently declared itself to be the "wrong forum" for determining whether state laws unconstitutionally interfere with the foreign policy needs of the nation. In finding the Massachusetts Burma law unconstitutional, the First Circuit misperceived the important state interests at stake and failed to heed this Court's warnings about deciding questions better left to the political branches.

ARGUMENT

I. STATE AND LOCAL GOVERNMENTS HAVE STRONG SOVEREIGN INTERESTS, GUARANTEED BY THE TENTH AMENDMENT, IN MAKING SPENDING DECISIONS THAT COMPORT WITH BOTH THE ECONOMIC AND ETHICAL PRIORITIES OF THEIR CITIZENS.

The First Circuit's mistaken decision to declare the Massachusetts Burma Law unconstitutional ultimately rested on its failure to take into account the important Tenth Amendment concerns raised by selective purchasing laws. The court framed its brief consideration of the state's interest in this case by asking whether "moral concerns regarding human rights conditions abroad" amount to a "legitimate local purpose" justifying the enactment of the Massachusetts

statute.[4] *National Foreign Trade Council*, 181 F.3d at 70-71. But Massachusetts' interest in this law goes beyond whether a state may express its views on human rights matters.[5] Here, the state has an independent institutional interest, apart from the substance of its social goals, in spending public money in a way that reflects the views of its citizens.

As a matter of constitutional design, the federal government was granted only specifically enumerated and discrete powers, with all remaining authority residing in the states as "residuary and inviolable sovereign[s]". *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison)). In establishing a bifurcated system, the founders created "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Id.* at 920 (quoting *U.S. Term Limits, Inc. v. Thorton*, 514 U.S. 779 (1995) (Kennedy, J., concurring)). This division of power and authority, while implicit in the limited constitutional grants to the federal government, was made express in the Tenth Amendment. *Id.* at 919.

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[4] The *amici* disagree with the application of this test, which incorrectly assumes that the Massachusetts law facially discriminates against international commerce. *See* Petitioner's Brief, pp. 46-47. However, the lower court's analysis is useful insofar as it illustrates its fundamental misunderstanding of the nature, purpose and function of selective purchasing laws.

[5] Indeed, there are strong arguments, which *amici* do not address here, that to the extent selective purchasing laws are pure expressions of public morality, they enjoy First Amendment protection from interference by the federal government. *See* Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l L. 1 (Feb. 1999).

Among the sovereign prerogatives reserved to the states and to the municipalities within their borders[6] is control over their own proprietary activities, including spending. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 436-440 (1980). In this respect, constitutional form follows function. Without control over their own budget and business affairs, states and localities would lack autonomy and financial independence, and ultimately would lose control over "the course of their public policy and the administration of their public affairs." *See Alden v. Maine*, 119 S.Ct. 2240, 2264-65 (1999) (quoting *In re Ayers*, 123 U.S. 443. 505 (1887)).

Moreover, as "guardian and trustee for its people," each state and local government is directly responsible to its citizens to administer public assets in conformity with their needs and priorities. *Reeves*, 447 U.S. at 438. "Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process." *Alden*, 119 S.Ct. at 2245. Nothing is more central to the way in which a government entity functions or is more telling about its priorities and basic political philosophy than the way it spends its money. If state or local officials use the public treasury in a manner failing to reflect the priorities and interests of their electorate, they are easily held accountable on voting day. The expenditure of tax levy funds is a matter of significant community interest and goes to the heart of democratic control of local institutions. *Cf. Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (political accountability for spending is strongest on the state level).

[6] Both state and municipal governments are protected from federal encroachment by the "Constitution's guarantees of federalism, including the Tenth Amendment." *Printz*, 521 U.S. at 932, n.15.

Local sovereignty over spending is not limited to crafting a budget, or establishing programs, but also extends to policy decisions about the identity of the contractors with whom the government wishes to deal. *See Reeves*, 447 U.S. at 438. Community ethics play an important and appropriate role in making these assessments.[7] *See Trap Rock Industries, Inc. v. Kohl*, 284 A.2d 161, 166 (N.J. 1981) (state may consider "moral integrity" of a contractor in deciding whether to award a public contract). There is nothing in the law prohibiting communities from applying non-price criteria -- such as human rights and environmental standards -- in selecting public contractors or investments. Putting it differently, the constitution does not *require* citizens, through their state and local governments, to conduct business directly or indirectly with slave-owners, dictators, or polluters.[8]

Through selective purchasing laws like the Massachusetts Burma Law, taxpayers collectively express their values and preferences in matters of public procurement, much as individual citizens do when refusing to invest in or purchase consumer goods from companies whose business,

[7] Many state and local procurement laws require a determination that a contractor is "responsible" before it can be eligible for government contracts. *See, e.g.*, N.Y. GEN. MUN. L. § 103 (McKinney 1998). The responsibility determination can, and often does, incorporate general public interest values. *See, e.g. Tully Construction Co., Inc. v. Hevesi*, 625 N.Y.S.2d 531, *appeal dismissed, leave to appeal granted*, 86 N.Y.2d 807 (1995), *appeal withdrawn*, 87 N.Y.2d 969 (1996) (contractor that, among other things, has ties to organized crime and previously violated environmental laws of another state, may not receive municipal contract).

[8] As discussed in the *amicus* brief of the AFL-CIO in the court below, it is not possible to do business in Burma without subsidizing and benefiting from forced labor, including child labor. *See* Brief *Amicus Curiae* of the American Federation of Labor and Congress of Industrial Organizations, pp. 18-20.

employment, or other practices they do not wish to condone.[9] The diversity of approaches reflected in these laws does not neutralize the protections afforded by the Tenth Amendment: "The genius of our government provides that, within the sphere of constitutional action, the people -- acting not through the courts but through their elected legislative representatives -- have the power to determine as conditions demand, what services and functions the public welfare requires." *Helvering v. Gephardt*, 304 U.S. 405, 428 (1938) (Black, J., concurring).

The lower court's sweeping conclusion that Massachusetts' interest in its Burma Law could have been "adequately served by reasonable nondiscriminatory alternatives" betrays a fundamental misunderstanding of the nature and purpose of these laws. *National Foreign Trade Council*, 181 F.3d at 70. Selective purchasing legislation does not merely express generalized disapproval of Burma or other countries; it prevents local tax revenues from being used to subsidize and implicitly endorse practices that violate community standards and beliefs. Public procurement is not optional. States and localities must obtain goods and services in order to function, and must make judgments about where and from whom to buy them. Nothing short of selective purchasing and investment laws can adequately protect the community interests at stake.

[9] The lower court held that selective purchasing laws are not consistent with the behavior of "ordinary market participants" and therefore do not fall within the Commerce Clause market participation exception. *National Foreign Trade Council*, 181 F.3d at 65. However, non-government purchasers and investors often incorporate environmental, human rights, labor, health and other ethical standards into their decisionmaking. *See generally, e.g.*, Corporate Social Issues Reporter, Investor Responsibility Research Center (December 1999). Moreover, this Court repeatedly has found states to be "market participants" even where they are promoting interests unique to their citizens that are unlikely to be shared by other ordinary actors in the market. *See College Savings Bank*, 119 S.Ct. at 2230.

II. WHERE CONGRESS HAS REFUSED TO PREEMPT STATE AND LOCAL SELECTIVE PURCHASING LAWS, REVIEW UNDER THE JUDICIALLY CREATED DORMANT FOREIGN COMMERCE CLAUSE AND DORMANT FOREIGN AFFAIRS DOCTRINES IS INAPPROPRIATE.

In view of the significant Tenth Amendment interests at issue, the lower court should not have reached the question whether the Massachusetts Burma Law violated the foreign commerce clause or the foreign affairs doctrine. The *amici* agree with the Commonwealth of Massachusetts that Congress did not preempt the Burma Law, which predated the federal legislation concerning Burma and is consistent with the federal approach. *See* Petitioner's Brief, pp. 14-24. In overruling Congress' refusal to assert federal authority over the state's sovereign interests in its procurement program, the court exceeded both its constitutional role and its institutional capacity.

The structure of the constitution is the primary device for maintaining the proper balance between the supremacy of federal law and the independent interests of the states. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, the Court observed that the principal safeguard for state sovereignty is the federal political process, which accommodates state interests because of the role the states play in choosing members of Congress and the Executive.[10] *Id.* at 550-51. By declaring the Burma Law

[10] This Court also teaches that the "good faith of the States" provides a corresponding guarantee concerning the supremacy of federal law. *Alden*, 119 S.Ct. at 2266. *See also Printz*, 521 U.S. at 930-931 (citing "duty owed to the National government, on the part of all state officials, to enact, enforce, and interpret state law in such a fashion as to not obstruct the operation of federal law.").

unconstitutional after Congress signaled its judgment that the state law did not interfere with foreign commerce or present a threat to the nation's foreign policy, the First Circuit usurped Congress' role as the constitutional arbiter in this respect. *Cf. U.S. v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J. and O'Connor, J., concurring) (Congress and the Executives' "sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance.").

The lower court's decision is particularly problematic because this Court has disavowed institutional competence to assess the validity of state proprietary decisions under the Commerce Clause.[11] "[T]he competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, . . . as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court." *Reeves*, 447 U.S. at 439.

Moreover, in *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), this Court recently declared the judiciary to be precisely the "wrong forum", *id.* at 328, for evaluating the kind of extraordinarily sensitive national interests and foreign policy considerations presented here. *See, e.g., National Foreign Trade Council*, 181 F.3d at 52 (concluding that the Burma Law has "more than an 'incidental or indirect effect in foreign countries'"), at 54 (weighing the law's "potential for disruption or embarrassment" to the nation based on complaints by ASEAN and the European Union), and at 68 (finding the law

[11] Although this case deals with the Foreign Commerce Clause, the political considerations involving foreign commerce counsel even greater restraint. *See Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. at 327-328.

interferes with the ability of the federal government to speak with "one voice").

In *Barclays*, 512 U.S. 298, the Court upheld California's method of taxing multinational corporations despite claims -- similar to those in this case -- that the tax interfered with the nation's ability to "speak with one voice" in matters of foreign policy and commerce and thus unconstitutionally impinged on federal prerogatives. The Court noted that Congress, the branch responsible for foreign commerce, had never enacted legislation explicitly prohibiting the California system, and therefore had "passively indicate[d] that certain practices do not impair federal uniformity in an area where federal uniformity is essential." *Id.* at 328. Emphasizing its inability to second-guess Congress' judgments, the Court explained that "[t]he judiciary is not vested with the power to decide "how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.'" *Id.* at 328.

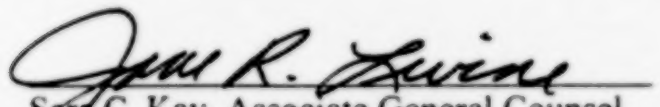
This case deals with the intersection of two highly politicized areas: state spending and foreign commerce. The federalism interests at stake in each dictate caution; together they mandate judicial deference to Congress' assessment of the constitutionality of the state law. "When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government." *Alden*, 119 S.Ct. at 2265. Were the lower court's decision allowed to stand, it would diminish the constitutional roles and interests of both Congress and the states, with a commensurate loss of liberty to the citizens of both.

CONCLUSION

For the reasons stated above, the *amici* respectfully request this Court to reverse the decision of the United States Court of Appeals for the First Circuit.

Dated: New York, New York
January 13, 2000

Respectfully submitted,



Sara C. Kay, Associate General Counsel
Jane R. Levine, Third Deputy
Comptroller*
OFFICE OF ALAN G. HEVESI,
COMPTROLLER OF THE CITY
OF NEW YORK
One Centre Street
New York, New York 10007
(212) 669-3749
Attorneys for *Amici Curiae*

**Counsel of Record*